PROGRESS OF THE PROPOSAL TO SUBSTITUTE RULES OF COURT FOR COMMON LAW PRACTICE

By Thomas W. Shelton,

Chairman, Committee on Uniform Judicial Procedure of the American Bar Association, Norfolk, Va.

Governmental improvement in republics, or a departure from long standing policies or customs, is so correlated with a popular understanding of its merit and need as to render the latter a condition precedent to achievement. Inasmuch as that condition is a true reflex of representative democracy it is not to be criticized, but should be recognized, preserved and wisely used in the interest of the general welfare. It is visualized in the processes of garnering intelligence by an intellectual free people. So it is that time profitably lapses while the conscientious legislator seeks his constituents' views on proposed new legislation. Preparing these constituents by imparting and popularizing the necessary knowledge thereby becomes the key to the door of success of any proposal, as it is the measure of the strength of a democratic government. Obviously then, this duty rests with those citizens best prepared and possessing the confidence of the people, the performance of which is evidence of the most supreme public spirit.

The Three Necessary Stages

It is the fate of every new measure proposed to a democracy to pass through the three distinct ordeals of investigation, education and legislation. Once approved by the accepted leaders of national and state thought, specially circumstanced to pass judgment upon it, and whatever its origin, the idea is properly credentialed for presentation to the masses, whereupon, the serious, highly responsible and patient work of education begins. The thoroughness and earnestness with which this is done, in the absence of some catastrophe impelling immediate legislative action, will measure the chance of successful, or speedy enactment into law. There is one exception to this rule, the cause of which is obvious to every lawyer—the reform of the procedure of the courts—the American history of

which we shall now outline, intermingled with a little philosophy and preceded by a short introduction. In this matter the people must trust their trained lawyers instead of politicians, just as in medicine they follow their experienced doctors.

SIMPLICITY ITS FEATURAL MERIT

There are few functions more highly technical and scientific than judicial procedure and which, when improperly applied, can become more wicked in results. There are few agencies that demand less simplicity in form and use or are worse impaired by mystery or technicality. Illustrated in nature, there is no element more useful and at the same time more deadly than electricity, and none requiring simpler methods of application. The vision of the unthoughtful never reaches or measures the research, concentration and highly perfected program of the philosophers and engineers who came so to understand the science of this necessary danger to mankind as to make it safely its servitor. But, once the scientific hand is removed from control, and the influential novitiate occupies the seat of experience and wisdom, it would revert to destructive methods, for it is axiomatic that ignorance meddling with science always brings its own punishment. Here is visualized investigation followed by education, resulting in economic utility.

DANIEL WEBSTER'S APPRECIATION

There is no human consideration of more importance than an acceptable administration of justice and few that are less appreciated and understood. Said Daniel Webster,

> Justice is the greatest interest of man on earth. It is the ligature which holds civilized beings and civilized nations together. Wherever its temple stands, and so long as it is honored, there is a foundation for social security, general happiness and the improvement and progress of our race. And whoever labors upon this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher to the skies, links himself in name, fame and character with that which is, and must be, as durable as the frame of human society.

SOCIAL HISTORY RECORDED IN THE COURTS

The world history of ethnogenic sociology may be traced through the courts, for there evolution leaves its trail in the last resort of all serious disputes and the interpretation of statutory

rules of conduct. Advancement is translated in England's Judicature Acts of 1873, when scientific court rules were established in the place of technical common law procedure. It was a spiritual revolution translating a matured sense of civic responsibility. Deliberate education and evolution is evidenced in the propaganda, beginning about 1821 and ending in 1835, to simplify pleading and procedure. It is then the seeds were sown that fructified forty years later. So it is seen that the commercial and ethical, as well as the social standards of every government and people, are reflected by their courts.

THE GENIUS OF THE JURIDICAL STATUS

Inasmuch as a reasonable and uniform justice depends upon the scientific and logical limitations and regulations thrown around the human element of these tribunals, their juridical status was, is and always will be, of first importance. More important than the form of government is the spirit that animates government. Judicial procedure fixes the condition, the time and manner as to which one may seek the use of the courts; it prevents surprise, oppression and a subsequent attack on the same issue; it makes the humblest man the equal of the strongest, and it confines the oppressive hand of the government to the orderly method open as well to every citizen. It thereby becomes the measure of civil liberty and of property rights. The history of the common law procedure and the substitution of rules of court, as has been said, is the history of the evolution of a great nation from a people, declared by Macauley to have been "outcasts and a by-word" following Cromwell's protectorate. Indeed, it reflects the very genius of government itself.

THE ATTITUDE OF LAYMEN TOWARDS JUDICATURE

The history of all time shows that qualifications for self-government are not innate in a people. Therefore associated with their absolute power in a democracy is a concomitant duty of obedience and respect for the authority they have found necessary to vest in certain individuals, if not for the individuals themselves. The abandonment of the arbitrament of arms for judicial settlement of disputes connotes the necessary individual submission. But, the consciousness of surrender of these natural rights breeds an almost

unconscious zealous and jealous watchfulness and suspicion. Many minds are regretfully set against the government. This human passion is reflected in America in political campaigns. In less organized countries it manifests itself in insurrection and civil war. In 1861, America furnished the most serious example, from the symptoms of which one is inclined to conclude that human nature is basically the same though differing in philosophy, discipline and refinement. Therefore, if the people shall rule, justice in a reasonably certain measure must be ascertained and administered, not popularly, but scientifically by fixed correlated rules, lest principle be sacrificed for expediency and the necessary popular faith fail from lack of respect.

ATTITUDE OF LEGISLATORS TO JUDICATURE

While these thoughts are peculiarly applicable to the courts, the legislative bodies that create their machinery, and necessarily control their fate, cannot logically be omitted from consideration. Said John Stuart Mill, "There is hardly any kind of intellectual work which so much needs to be done, not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of making laws." Organized society has no more dangerous enemy than a legislative incapacity to distinguish between personal pride of opinion and the general welfare. The courts are the worst sufferers from this conceit through the presence of reactionary or poorly prepared lawyers in legislative bodies. It is in the power of a few such men to prevent all advancement. This is not uncommon in America, for "no man is so merciless as he who, under a strong self-delusion, confounds his antipathies with his duties."

THE AWAKENING OF THE PEOPLE

The stern exigencies of painful results shocked the American people from a state of pensiveness less than a decade ago. Gradually, a characteristic zealous and jealous watchfulness matured into a militant propaganda that is evolving into progress, is emancipating men from the senseless slavery of partisanship and is bringing them to a highly conceived sense of neighborhood responsibility. They are individually seeking the light—the surest symptom of a robust intellectuality. The appetite for investigation

into all public affairs increased with knowledge, which has not been withheld.

THE AMERICAN BAR ASSOCIATION ENTERS

It was the consciousness of these facts that galvanized an erstwhile complacent bar into an energetic, cohesive force. This fertile field for popular education held out a beckoning hand to the great American Bar Association to which it heartily responded in 1911, with the organization of its Committee on Uniform Judicial Procedure, charged with the duty of educating the people on the relation of the courts to government and their duty to the courts, and to set them free from legislative domination to the end that justice might be scientifically and uniformly administered. And thus began the first organized propaganda with the distinct object of bringing popular support to the courts, through a popular acquaintance with them and the organic functions of the judicial department of government in order that the processes of perfecting the courts might be understood and appreciated, and that suitable demands might be made upon their representatives in legislative bodies. The splendid success attending it has well justified the effort.

A LEGISLATIVE CONVERSION

Eight years ago, Honorable Reuben O. Moon, then chairman of the Committee on the Judiciary of the House of Representatives, in a letter to the writer, deplored the hopelessness of juridical remedial legislation because of a "lack of trust by Congress in the courts," and that Argus of the people, Everett P. Wheeler, continued to knock vainly upon the congressional doors for temporary relief from conceded wicked incompetency and useless technicality. Today a different atmosphere prevails. So great has been the change in representative sentiment and official thought that, two years ago, the same committee, presided over by Hon. Edwin Y. Webb, unanimously spoke these words:

> While your committee could not close its eyes to the material aspect of the matter, as expressed in unnecessary tolls upon commerce, it has looked higher and viewed the courts as governmental agencies, the obstruction of which or the weakening of the faith in which means a blow at the very vitals of constituted government. We do not venture to give expression to the evil consequences that would follow. It has been truthfully said:

"The executive and legislative departments of government could cease their activities for a given time without other harm than serious inconvenience; but the suspension of the functions of the courts for one day would mean anarchy—might and not right would be the measure of civil liberty and property rights."

But Congress likewise has a personal and selfish interest in developing the courts to the highest efficiency. As the agencies through which the law is administered, they absolutely measure the potency and dignity of the statutes enacted by Congress. These laws are no better and no worse than the manner in which they are administered. The courts have been compared to the pipes that convey water into and about a city. It matters not with how much pure and wholesome water the great reservoir has been provided, the quantity and quality actually received by the people is measured absolutely by the condition of the pipes in which it is conveyed. If they be clogged or foul or insufficient so will the supply actually reaching the people be unhealthful, insanitary, and insufficient. Congress, therefore, owes to itself and its popularity, apart from its sacred obligation to its constituents, to face this problem promptly that it may be solved, and no solution could be more appropriate than that which has met with such universal indorsements as the bill recommended. Indeed all responsibility for its success is virtually lifted from the shoulders of Congress to that of the great lawyers and teachers who unanimously commend it and demand it. It is under the influence of these thoughts that we enter into a more detailed presentation of the reasons that constrain us to recommend for immediate adoption the American Bar Association's federal procedure bill.

Congressman Moon might well have reflected upon the prediction of Madison that, if this government ever fell it would be caused by the trespass of the legislative upon the judicial department of government. Or else, like thousands of awakened citizens, upon the declaration of the sacred Virginia Bill of Rights,[1]

That the legislative, executive, and judicial departments of the state should be separate and distinct; and that the members thereof may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken.

THE AMERICAN BAR ASSOCIATION'S PROGRAM

The American Bar Association's program, visualized in a model statute designed to establish an equable division of power between the legislative and judicial departments of government, merely vests in the Supreme Court of the United States the power to substitute rules of courts for the present statutory, or common law procedure, and to prescribe all other regulations of detail for the

[1] Section 5.

operation of the *nisi prius* courts. The simplicity and logic of the program and its foundation of fundamental principles caught the public fancy and has grown steadily in esteem. Failure of justice had thereby served a useful purpose. Like the proposed rules, the well matured scheme embracing them, state uniformity and fixed interstate judicial relations, needed no elucidation and were free from the metaphysical subtleties and mystery that seem to have long narcotized the traditional unselfish patriotism of the great majority of the members of a noble and highly responsible profession. But the American Bar Association's action was unanimous, which, while furnishing the proper inspiration to the lay public, leads us directly to the dark days of investigation—to the history of the years preceding this successful campaign of education, for it was a carefully devised and far-reaching program.

IT UNDERWENT A RIGID INVESTIGATION

In the beginning, Roscoe Pound, one of the great doctors, literally pioneered and manned the ship of investigation alone. He refused to be placated with the expediencies of temporary statutory patchwork but demanded the substitution of a model system of scientific, correlated rules of court for the anachronism of common law procedure, or the empiricism of code pleading. His watchfulness generated a skepticism that resulted in a criticism of all proposals until that of the American Bar Association of 1911, unanimously approved by Henry D. Estabrook's committee, which met with his entire approval and generous support. The list of other supporters, with a few rare exceptions, is the list of the great lawyers, judges and teachers of this great country. Mr. Taft had, in messages to Congress, officially endorsed the principle involved and, in and out of season, had demanded action. It was under his inspiration that the program took shape and under the encouragement of President Wilson's Kentucky address that it was proposed to the bar association. President Wilson, unofficially, in private correspondence and in speeches in Kentucky, Springfield and later in New York, pointed out the obvious need of juridical improvement and declared that the bar association that achieved the result would become the creditor of mankind, but he has never spoken officially, which is the cause of congressional delay.

THEIR APPROVAL ASSURED SUCCESS

But when the critical investigators became enthusiastic teachers, the success of the organized campaign of education immediately instituted was assured, however long deferred by a few unappreciative legislators. State by state, the organized lawyers rose to the occasion for the first time in the history of the world, magnanimously sank all pride of opinion and enthusiastically endorsed the entire program until forty-four states are upon record. But another record has been broken. The presiding judges of the several state appellate courts and the federal circuit courts of appeals organized in 1913 a permanent annual conference, now officially designated as the Judicial Section of the American Bar Association. This was the first formal convention of judges in American history, if not in the world. These were followed by civic organizations like the National Civic Federation, presided over by the lately lamented Seth Low; commercial organizations like the National Association of Credit Men, with J. H. Tregoe as manager; the Southern Commercial Congress; the Chamber of Commerce of the United States and the Commercial Law League of America.

A PRACTICAL AGENT AT WORK

The most intelligent propaganda has been conducted by the American Judicature Society, of which Herbert Harley is the secretary and many national lawyers are directors. It presents model forms as exemplifications of accepted theories and thus reduces conjecture to the concrete. A conspicuous example is a complete system for the correlation of state courts prepared by Chief Justice Sidney Smith of Mississippi, that will eventually command national attention. A schedule of rules is also being prepared by the American Judicature Society with Samuèl Rosenbaum, of the Philadelphia Bar, as draftsman.

WHERE IT IS IN OPERATION

It is doubtful if any other national program ever received such enthusiastic endorsement and militant support. The state of Virginia, in 1917, forsook her patchwork common law procedure modified by statute that had become a fetish, when her legislature unanimously enacted the principle of rules of court, yet to be put

into effect. New Hampshire and Connecticut had long since embraced it and New Jersey had gone as far as its Constitution permitted. Colorado followed. The chancery side of the federal courts as well as the admiralty and bankruptcy courts has been most successfully operated by rules of court, and in every new federal tribunal, rules and not statutes, regulate the pleading and procedure.

WHY HAS NOT CONGRESS ACTED?

And yet the necessary federal legislation has not been enacted. It has been the victim of the opportunity for suppression by a committee and the power of preventing a vote on the Senate floor. It is believed that a powerful public sentiment has made these selfish obstruction tactics politically inexpedient or a thing of the past. Although unanimously and promptly recommended by the Judiciary Committee of the House, it was held in the Senate Committee five years and finally favorably reported at the last session too late to survive the personal disfavor of five senators who possessed the power to defeat the organized bar, speaking for the American people. It must now begin *de novo*. These thoughts inspire the remark that while the administration of justice is too sacred a thing to sink to the level of political partisanship, it is not too far above the heads of those enjoying political preference for a realization, that the same great and much wooed power supports both—the people of the United States—for this has become their battle. They see in it the spirit of pioneer simplicity vitalized by the teaching and sacrifices of America's best lawyers and judges. Thus the next campaign of education may be profitably conducted in a different field.

COMMON LAW PROCEDURE ALMOST ABANDONED

Common law procedure no longer possesses a partisan. It still has a precarious foothold in Florida, Maryland, Michigan, Mississippi, Illinois and West Virginia, with the aid of "statutory amendments," the crutches upon which decrepitude has hobbled for more than half a century. Michigan, Mississippi and Illinois are in the throes of an energetic campaign led by men whose names are synonymous with public virtue and patriotism. A committee of the Mississippi State Bar Association, inspired by Chief Justice Sidney Smith, has prepared and submitted a practical program for the

complete reorganization of the state judicature which was published by the American Judicature Society. This will, in due course, be personally presented to and should receive the direct approval of the people when its enactment into law can no longer be prevented.

THE PSYCHOLOGY OF COURT RULES

To the observant a psychological aspect protrudes itself that cannot be underestimated. The sense of responsibility will awaken a new and unselfish interest on the part of the lawyers and will inspire their best efforts. Personal pride will play an important part in inducing them to support and maintain the new régime that would owe its existence and gradual improvement in large measure to the aid contributed by them. This is really the human crux of the whole scheme. Moreover, it will give to the people the benefit of the sympathetic direction of their ablest lawyers and will guide criticism in a harmless manner to a personally responsible and responsive agency. Lawyers will be transformed from the hostile juridical critics that they are now forced to be, into the helpful supporters they should be, as officers of the court.

LET US HAVE A HIGH JUDICIAL COMMISSION

We have spoken of the gradual improvement of the proposed system of rules which is as important as formulating them. This implies a central agency to receive, analyze and formulate suggestions from the bench and bar. This is the English custom, and some organization is essential. Dean Wigmore suggested a "Superintendent of the Courts." Accepting the principle, but expanding the idea for the purpose of economy and greater usefulness, we suggested an uncompensated High Judicial Commission to meet bimonthly, and composed of the attorney-general or solicitor-general, a member of the Supreme Court of the United States; a United States circuit and district judge; two state appellate court judges; two law teachers and four practicing lawyers. They would have an office and a paid secretary located at Washington who would receive and distribute to the members all communications from the people, the bench and the bar. These would greatly aid and stimulate the members of the Commission in their personal observations and deliberations.

SOME CONCLUDING THOUGHTS

If, without presenting the scientific merits of a system of rules of court and its advantages over common law procedure, the common law procedure modified by statute, and the code practice, a sense of gratification is felt that will be a satisfying evidence of the success of the campaign for the modernization of the courts. It will be an inspiring reward for the time and money patriotically invested by interested lawyers, who have unselfishly labored against legislative indifference or obstinacy. Success is assured the moment the American Bar Association's federal procedure bill can be brought to a vote in the United States Senate. That is the answer to the inquiry of progress! Edmund Burke has well expressed the sentiment of the modern judges and lawyers, "Applaud us when we run, console us when we fall, cheer us when we recover, but let us pass on—for God's sake—let us pass on!"